IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. LAWRENCE EDWIN JASPER, Appellant.	No. 33196-9-II UNPUBLISHED OPINION

BRIDGEWATER, J. — Lawrence Edwin Jasper appeals his conviction for second degree burglary and first degree theft. We affirm.

i. Sufficiency of the Evidence

Jasper was charged with second degree burglary and first degree theft. The jury was also instructed on accomplice liability. These charges arose from an early morning burglary of a shop/garage. Numerous items were taken during the burglary. Jasper and two others were apprehended in a van matching one of the suspect vehicle descriptions, six hours later, in proximity to the burglarized shop/garage near the scene of the crime, and gave an implausible explanation for how they came into possession of the stolen goods. He contends that insufficient evidence supports his conviction. We hold that the evidence was sufficient.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be

drawn therefrom." *Salinas*, 119 Wn.2d at 201. Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). We must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

"A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle or a dwelling." RCW 9A.52.030(1).

A person is guilty of theft in the first degree if he or she commits theft of property which exceeds one thousand five hundred dollars in value. RCW 9A.56.030(1)(a). "Theft" means: "[t]o wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services." RCW 9A.56.020(1)(a).

To find Jasper guilty as an accomplice, the jury would have to have found that Jasper, with knowledge that it will promote or facilitate the commission of first degree burglary and first degree theft, solicited, commanded, encouraged, or requested another person to commit the crime; or aided or agreed to aid another person in planning or committing the crime.

It is well settled law in Washington that proof of possession of recently stolen property is not prima facie evidence of burglary unless accompanied by other evidence of guilt. *State v. Mace*, 97 Wn.2d 840, 843, 650 P.2d 217 (1982). Other evidence of guilt may include a false or improbable explanation of possession, flight, use of a fictitious name, or the presence of the

accused near the scene of the crime. *Mace*, 97 Wn.2d at 843.

The facts in this case can be analogized to those in *State v. Mevis*, 53 Wn.2d 377, 333 P.2d 1095 (1959) and *State v. Rodriguez*, 20 Wn. App. 876, 582 P.2d 904 (1978). More than just possession of recently stolen property supports Jasper's convictions. Other corroborative circumstances indicating his guilt support his convictions. Jasper was found six hours after the burglary just up the road from the scene of the crime in a dark colored minivan matching one of the descriptions of the suspect vehicle, containing the very items that were stolen earlier. Inside the van were three sets of gloves, placed in the van according to seating arrangements and a backpack containing numerous items that could be used to accomplish a burglary. The occupants said they found the property up the road over an embankment when the driver pulled over to urinate. But their story is implausible given the hour time frame they said they were in the area, the physical condition of the location where they claimed to have found the property, and the condition of the stolen items. The evidence showed that the earth on the embankment was essentially undisturbed. If they found the items and retrieved them going down and then back up the embankment side, more than one set of footprints would have been found, since it takes at least two people to lift the 200-pound lawnmower. The muddy embankment area would also have been more disturbed by the going up and down to retrieve items and dragging items on the muddy surface.

More importantly, the tools themselves would be obviously muddy and dirty from being on the ground of the embankment. But the victim testified that the tools looked like they just came out of his shop. Even if Jasper and his friends found and retrieved the property from the brush/shrub side of the embankment, this area was full of debris and no debris was discovered on

the tools.

Additionally, the deputy matched the rear tire of the minivan Jasper occupied, to the tire print left at the scene of the crime. The victim also testified that the rear tires were similar to those she observed at the scene of the crime.

If a palm print in a store where defendant had been before is enough additional evidence of guilt to support a burglary conviction in *Rodriguez*, 20 Wn. App. at 881-82, then the facts here are more than sufficient to support Jasper's first degree burglary conviction and theft conviction. Thus, based on the above evidence and inferences, the jury could find that Jasper, either as a principle or an accomplice, committed the crime of second degree burglary and first degree theft.

II. Prosecutorial Misconduct

Jasper argues several of the prosecutor's comments during closing argument amounted to prosecutorial misconduct.

In determining whether prosecutorial misconduct has occurred, we first look at whether the defendant objected to the alleged misconduct. *See State v. Gentry*, 125 Wn.2d 570, 640, 888 P.2d 1105, *cert. denied*, 516 U.S. 843 (1995). If the defendant objected, we evaluate: (1) whether the prosecutor's comments were improper; and (2) whether a substantial likelihood exists that the improper statements affected the jury's verdict. *Gentry*, 125 Wn.2d at 640. The defendant bears the burden of showing both prongs of prosecutorial misconduct. *State v. Hughes*, 118 Wn. App, 713, 727, 77 P.3d 681 (2003), *review denied*, 151 Wn.2d 1039 (2004).

Failure to object to an improper remark constitutes a waiver of error, unless the remark is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. *Gentry*, 125 Wn.2d at 640. "The absence of

a motion for mistrial at the time of the argument strongly suggests to a court that the argument . . . did not appear critically prejudicial to an appellant in the context of the trial."[1] *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991).

The prosecutor has wide latitude during closing argument to draw and express reasonable inferences from the evidence. *State v. Boehning,* 127 Wn. App. 511, 519, 111 P.3d 899 (2005).

We review a prosecutor's remarks in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. *State v. Brown*, 132 Wn.2d 529, 562, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). Juries are presumed to follow the trial court's instructions. *State v. Davenport*, 100 Wn.2d 757, 763-64, 675 P.2d 1213 (1984); *State v. Trout*, 125 Wn. App. 403, 420, 105 P.3d 69, *review denied*, 155 Wn.2d 1005 (2005).

A. Vouching for witness credibility

Jasper argues the prosecutor impermissibly vouched for witness Kenneth Duling's credibility during closing argument when he said that "[Kenneth] is a real good, honest young man." Report of Proceedings (RP) (March 23, 2005) at 153. The State concedes the comment was improper but asserts that any resulting prejudice could have been cured by an objection and curative instruction.

The prosecutor made the statement during closing argument in the context explaining some inconsistencies in the evidence regarding the color of the van observed by Kenneth, the only

[1] "Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal." *Swan*, 114 Wn.2d at 661 (quoting *Jones v. Hogan*, 56 Wn.2d 23, 27, 351 P.2d 153 (1960)).

eyewitness to the incident.

Because Jasper did not object to the comment or ask for a curative instruction, he must show that the misconduct was so flagrant and ill intentioned that no curative instruction could have obviated the resulting prejudice. *Gentry*, 125 Wn.2d at 640. His failure to object or move for a mistrial at the time of the argument "strongly suggests" that it "did not appear critically prejudicial [to the defendant] in the context of the trial." *Swan*, 114 Wn.2d at 661.

Here, Jasper failed to put forward any argument establishing how this admittedly improper yet isolated comment by the prosecutor caused enduring and resulting prejudice. Thus, he waived any error. *Gentry*, 125 Wn.2d at 640 (defendant's failure to object to an improper remark waives any error unless he can establish that the prejudice could not have been cured by admonishing the jury); *see also* RAP 10.5(a)(5) (failure to adequately argue an issue constitutes waiver of that issue). But, assuming, without deciding that it was prejudicial, a curative instruction to disregard the comment would have obviated any prejudice. Thus, we hold that the prosecutor's comment vouching for Kenneth's credibility did not deprive Jasper of his right to a fair trial.

B. License Plate

A deputy testified that it is not uncommon for vehicles used in criminal activity to have swapped/throw-down license plates. At the scene of the crime, the police discovered an Oregon plate registered to a 1994 minivan. This license plate was different than the license plates on the vehicle that Jasper was apprehended in. Jasper was found up the road from the scene of the crime in a minivan packed full with the very items stolen during the burglary. The van had both its license plates on it.

Jasper asserts that the prosecutor's following comments during the State's closing

argument constituted prosecutorial misconduct because they are unsupported by evidence: "when people do crimes and they don't want to get caught, you put a different license plate on your car . . . They stole a license plate from a 1994 Plymouth Voyager." RP (Mar. 23, 2005) at 148-49. Jasper objected to these remarks and the court twice instructed the jury to recall/remember the evidence. We agree with the State that the prosecutor was merely drawing reasonable inferences from facts in evidence.

But even assuming that the portion of the prosecutor's comments about Jasper and his companions *stealing* a license plate to use as a throw-down plate went beyond mere inferences into arguing facts not in evidence, Jasper's argument fails because he cannot establish prejudice. After defense counsel objected, the court promptly admonished the jury to "remember the testimony." RP (Mar. 23, 2005) at 149. It also instructed the jury at the close of the evidence that arguments by counsel are not evidence and to disregard any remarks not supported by the evidence.[2] Juries are presumed to obey the court's instructions. *Davenport*, 100 Wn.2d at 763; *Trout*, 125 Wn. App. at 420. Absent any showing to the contrary, this court presumes that the jury followed the court's instruction. *Davenport*, 100 Wn.2d at 763-64. This presumption has not been rebutted here.

[2] In fact, jury instruction number one tells the jury in part: "[y]ou are the sole judges of the credibility of the witnesses and of what weight is to be given to the testimony of each. In considering the testimony of any witness, you may take into account the opportunity and ability of the witness to observe, the witness's memory and manner while testifying, any interest, bias, or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on the believability and weight." Clerk's Papers (CP) at 8-9.

C. Burglary Kit

Before trial, the court granted defense counsel's motion "to exclude any opinion evidence of dark clothing and flashlight that were found in the possession of the Defendants as being a burglary kit," explaining that the jury can consider evidence that it was found in the back of the truck along with the stolen/found property and both parties will be able to argue what the reasonable inference is from that evidence "even though they aren't particularly suited just for burglaries . . . but just . . . no opinion or conclusions can be elicited from the witnesses." RP (Mar. 21, 2005) at 36-37.

Jasper argues that the following statement made by the prosecutor during closing arguments was misconduct because it violated the court's pretrial ruling and is unsupported by the evidence: "This [black backpack] is much more than a bicycling kit, it's a burglary tool kit." RP (Mar. 23, 2005) at 158.

We agree with the State's position that the prosecutor's comment was a reasonable inference from the facts and that he did not violate the court's order. That order only prohibited eliciting opinion testimony that the backpack was a burglary kit not argument in closing that it was indeed a burglary kit.

D. Defendant's thoughts

Jasper contends that the prosecutor committed misconduct when it commented on what he was thinking. He asserts it is improper because no facts in the record support these comments.

During closing arguments, the prosecutor said this case boils down to a "who done it." RP (Mar. 23, 2005) at 143. He attributed a thought process to the defendants about concocting a story to explain the stolen items in their car while they were being followed by the sheriff.

A prosecutor has wide latitude during closing argument to draw and express reasonable inferences from the evidence. *Boehning,* 127 Wn. App. at 519. If the State's evidence is believed, a reasonable inference is that the three people who broke into the victim's shop six hours before with their van filled to the brim with stolen goods would be concocting a story of how to avoid criminal liability when being followed by the police.

But even if the comment was improper, any prejudicial effects could have been neutralized by striking the record and an admonition to the jury to remember the evidence presented. No such request was made. Jasper has the burden to show that a substantial likelihood exists that the improper remark affected the jury's verdict. *Gentry*, 125 Wn.2d at 640. He provides no argument as to how this remark affected the jury's verdict. Thus, he cannot show that this remark amounts to prosecutorial misconduct.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Bridgewater, J.

We concur:

Houghton, P.J.

Penoyar, J.